87-2124

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNIMET CORPORATION, Reorganized Chapter 11 Debtor,

Petitioner,

—v.—

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Dated: New York, New York
June 20, 1988

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QUESTION PRESENTED

Does section 1113 of the Bankruptcy Code (11 U.S.C. § 1113) apply to a non-executory collective bargaining agreement of a debtor having no union employees and grant its union retirees' claims a superpriority over and above all priorities legislated by Congress in sections 503 and 507(a) of the Bankruptcy Code (11 U.S.C. §§ 503, 507(a)) and over and above all non-union retirees and all other claimants?

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No. ____

UNIMET CORPORATION, Reorganized Chapter 11 Debtor,

Petitioner,

—v.—

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Unimet Corporation, reorganized debtor ("Unimet"), respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Sixth Circuit entered on March 22, 1988, reversing an order of the United States District Court for the Northern District of Ohio (Eastern division). The District Court affirmed a Bankruptcy Court holding that 11 U.S.C. § 1113 does not apply to a collective bargaining agreement of a debtor having no union employees, and that therefore Unimet's liability for union retiree benefits under its collective bargaining agreement was not an administrative expense payable under either 11 U.S.C. § 503(b) or 11 U.S.C. § 1113.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reproduced as Appendix A, is cited and reported as *United Steelworkers of America* v. *Unimet Corp.* (*In re Unimet Corp.*), 842 F.2d 879 (6th Cir. 1988). The opinion of the United States District Court for the Northern District of Ohio entered on January 18, 1987, is reproduced as Appendix B. The opinion of the Bankruptcy Court dated September 27, 1985, is reproduced as Appendix C.

SUBJECT MATTER JURISDICTION

On March 22, 1988, the opinion of the United States Court of Appeals for the Sixth Circuit was entered. The United States Supreme Court has subject matter jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

The applicable sections of the Bankruptcy Code, 11 U.S.C. §§ 101(4), 103(a), 365(a)-(g), 503, 507, 726, 1113 and 1123 are reproduced as Appendix D.

STATEMENT OF THE CASE

Facts.

Unimet formerly owned and operated a manufacturing plant in Canton, Ohio, at which it manufactured tubular light poles. Memorandum Opinion and Order dated November 17, 1986, annexed as Appendix E. Certain employees of the Canton plant were covered by a three-year collective bargaining agreement between Unimet and the United Steelworkers of America ("USWA"), entered into on November 7, 1983 (the "Collective Bargaining Agreement"). 842 F.2d at 880. The agreement was to terminate November 6, 1986. Unimet closed its Canton plant

on May 11, 1984, Motion for Approval of Rejection of Collective Bargaining Agreements, annexed as Appendix F at 56a, 842 F.2d at 880, and permanently laid off its 60 employees, App. F at 56a, because Unimet sold its tubular operations. Application For Order To Pay As Administrative Expenses Certain Insurance Premiums, annexed as Appendix G at 60a.

Pursuant to the Collective Bargaining Agreement, Unimet had an obligation to make payments under an Indirect Economic Benefits Agreement which was incorporated into the terms of the Collective Bargaining Agreement. On the date the plant closed and continuing through the commencement of Unimet's chapter 11 case on March 8, 1985, the sole remaining obligation under Unimet's Collective Bargaining Agreement was Unimet's obligation to pay certain premiums for retirees' optional health insurance, and life insurance. The union retirees had no obligations left to perform under the Collective Bargaining Agreement and there were no union employees. 842 F.2d at 880.

Procedural History.

Unimet commenced its chapter 11 case on March 8, 1985. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code (11 U.S.C. §§ 1107(a) and 1108), Unimet was authorized to operate its business as debtor in possession.

On June 11, 1985, Unimet filed its motion for an order approving its rejection of the Collective Bargaining Agreement under 11 U.S.C. § 1113 (the "1113 Motion"). App. F. By memorandum decision and order dated August 6, 1985, the Bankruptcy Court denied the 1113 Motion finding that Unimet had failed to comply with the procedural requirements of 11 U.S.C. § 1113(b)(2) relating to the bargaining process. Memorandum of Decision and Order annexed as Appendix H.

Accordingly, USWA contended that Unimet should continue paying the retirees' claims for medical and life insurance premiums pursuant to 11 U.S.C. § 1113(f). Conversely, Unimet believed that if it paid those general claims under its Collective Bargaining Agreement, it would not have sufficient funds to

pay the ongoing administrative and priority expenses of its chapter 11 case. App. G at 60a. Thus, Unimet's payment of the general claims would grant the retirees' claims a superpriority over the ongoing administrative expenses and priority claims, which superpriority is not granted by 11 U.S.C. §§ 503 and 507.

Most important, Unimet concluded that its 1113 Motion for an order approving rejection of the Collective Bargaining Agreement under 11 U.S.C. § 1113 had been unnecessary because section 1113 is only applicable to *executory* collective bargaining agreements, while Unimet's Collective Bargaining Agreement was not executory. App. C at 25a. Rather it constituted a general unsecured prepetition debt from Unimet to its union retirees. There were no obligations flowing back to Unimet.

Therefore, rather than appeal the order denying Unimet's 1113 Motion, less than ten days after the order was entered Unimet filed a follow-up motion requesting an order permitting Unimet not to pay the retirees' claims, or alternatively, requiring Unimet to pay them. App. G at 60a. Unimet made clear on the first page of its motion that it believed it should not pay the retirees' claims because payment would grant the retirees' claims a super administrative expense priority not granted under 11 U.S.C. § 503(b). Conversely, as the United States Court of Appeals understood, if Unimet was supposed to pay those claims it wanted an order saying so "to protect itself from the possibility that other creditors would challenge an attempt to pay the premiums required by the unrejected collective bargaining agreement. . . ." 842 F.2d at 880.

By memorandum decision and order dated September 27, 1985, the Bankruptcy Court held the retirees could not invoke 11 U.S.C. § 1113, and that to pay their claims as administrative expenses was impermissible under 11 U.S.C. § 503(b) because the expenses were not necessary to preserve the estate.[1] App. C at 25a-27a.

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1 Below, USWA argued that after Unimet applied for an order pursuant to 11 U.S.C. § 1113 approving its rejection of the Collective Bargaining Agreement, and after the Bankruptcy Court denied the 1113

USWA appealed the Bankruptcy Court's order to the United States District Court for the Northern District of Ohio. On January 18, 1987, the United States District Court affirmed the Bankruptcy Court's decision. App. B.[2] The District Court held that the insurance premiums should not be paid as administrative expenses under 11 U.S.C. § 503(b)(1)(A) and that § 1113 provided no independent basis for their payment. USWA appealed to the United States Court of Appeals for the Sixth Circuit.

By opinion dated March 22, 1988, the Sixth Circuit decided in favor of USWA. The Sixth Circuit reversed the District Court's decision on the basis of its conclusion that 11 U.S.C. § 1113 applies to the Collective Bargaining Agreement and mandates continued payment of retiree benefits under the Collective Bargaining Agreement. The Court assumed without deciding that the retiree benefits otherwise fail to meet the requirements for administrative expense priority and payment under § 503 of the Bankruptcy Code. 842 F.2d at 884.

Motion, Unimet could assert neither that the agreement was not executory nor that section 1113 would not apply. USWA overlooks that bankruptcy courts have long been vested with power to enter remedial orders correcting the mistaken application of a statute or principle. *See, e.g., Wayne United States Gas Co.* v. *Owens Ill. Glass Co.*, 300 U.S. 131 (1937) (district court sitting in bankruptcy can correct and revoke its order dismissing reorganization petition even after time to appeal expires); *Pfister* v. *Northern Ill. Fin. Corp.*, 317 U.S. 144, 149 (1942); *Otte* v. *Manufacturers Hanover Commercial Corp.* (*In re Texlon Corp.*), 596 F.2d 1092 (2d Cir. 1979).

2 By its order, the United States District Court vacated an earlier decision and order reversing the Bankruptcy Court. App. E. It had determined to reverse based on a purportedly newly enacted statute furnished by USWA that USWA failed to advise had not been (and has never been) enacted. Motion to Amend and Reconsider Memorandum Opinion and Order filed November 18, 1986, annexed as Appendix I.

REASONS FOR GRANTING THE WRIT

Unimet requests the United States Supreme Court to grant its petition for a *writ of certiorari* because the Sixth Circuit in the decision and order below misread and misapplied section 1113 of the Bankruptcy Code which results in:

1. **Judicial Legislation.** The court below has judicially legislated a superpriority administrative expense for union retiree claims over nonunion retiree claims and all other claims that Congress did not provide for in sections 503 and 507 of the Bankruptcy Code;

2. **Absurd Results under the Bankruptcy Code.** The court below has created an absurdity in the Bankruptcy Code under which retiree claims in chapter 11 cases in which former divisions have been closed or sold receive payment in full, while the same claims in a chapter 7 (liquidation) case have no claim to full payment at any time; and

3. **Violation of Equitable Distribution Policy.** The fundamental bankruptcy policy of equitable distribution under which creditors of equal rank share equally is undermined, causing prepetition union retiree claims to be paid more and ahead of, for instance, all other priority and administrative claims.

THE ERROR OF THE COURT BELOW WAS ITS APPLICATION OF BANKRUPTCY CODE SECTION 1113 TO A NON-EXECUTORY COLLECTIVE BARGAINING AGREEMENT.

As acknowledged by the court below, 842 F.2d at 882, Bankruptcy Code section 1113 was the legislative response to *NLRB* v. *Bildisco and Bildisco*, 465 U.S. 513 (1984) ("Bildisco"). There, the Supreme Court rendered two holdings.

First, the Court held that if reasonable efforts to negotiate a voluntary modification are made and are unlikely to produce a prompt and satisfactory solution, then a debtor-employer may

reject its collective bargaining agreement so long as the balance of the equities favors rejection when weighed from the viewpoint of what is necessary to obtain a successful reorganization. 465 U.S. at 526. Second, the Court held that the debtor-employer was not guilty of an unfair labor practice under the National Labor Relations Act, 29 U.S.C. § 158, for unilaterally rejecting or modifying a collective bargaining agreement prior to court approval. 465 U.S. at 534.

In Bankruptcy Code sections 1113(a) through (e), Congress substantially codified the Supreme Court's first holding. Conversely, in section 1113(f) Congress replaced the second holding with a prohibition against unilateral modifications. Bankruptcy Code section 1113(f) provides:

> No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Simply put, the court below looked at section 1113(f) in a vacuum (it even ignored the other parts of section 1113)[3] and

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3 Throughout Bankruptcy Code section 1113, the term "employee" is used, and the term "retiree" is not. Given that section 1113 was enacted to change the Supreme Court's second holding relating to whether a debtor commits an unfair labor practice by not negotiating amendments of a collective bargaining agreement, and given that unfair labor practices can only be committed against employees (not retirees), *Allied Chem. & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), it appears clear that section 1113 was not intended to change treatment of retirees' claims. The court below, however, seized on the language in section 1113(f) barring unilateral alterations of "any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." The court assumed that "any provisions" must include retiree provisions in a non-executory contract. The court overlooked, however, that "compliance with the provisions of this section" means that the debtor must, for instance, negotiate changes in wages, benefits or work rules "necessary to permit reorganization." Bankruptcy Code section 1113(b)(1)(A), 1113(e). When the business has been sold such as in the case at bar, the negotiations contemplated by section 1113 become meaningless. Indeed, the only negotiation a debtor may have

reasoned that retiree benefits are provisions in the Collective Bargaining Agreement and therefore cannot be altered without the court approval provided for in section 1113. That syllogism is defective primarily because it ignores that section 1113 is inapplicable in the first place to non-executory collective bargaining agreements.

The statutory title of section 1113 is "Rejection of collective bargaining agreements." Additionally, section 1113(a) provides that section 1113 governs the assumption or rejection of collective bargaining agreements in chapter 11 cases. The terms 'rejection' and 'assumption' have been used in the bankruptcy laws of the United States at least since the Bankruptcy Act of 1898. They have only been used in connection with obtaining court approval to assume or reject executory contracts and unexpired leases. *See* Bankruptcy Act section 70b, former 11 U.S.C. § 110(b), and Bankruptcy Code section 365, 11 U.S.C. § 365. If Congress had intended to change a practice and law in existence for almost 100 years, and apply assumption and rejection to non-executory contracts, manifestly it would have said so. *See United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assoc., Ltd.*, 108 S. Ct. 626, 634 (1988); *Kelly* v. *Robinson*, 107 S. Ct. 353, 359-60 (1986); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986); *Emil* v. *Hanley*, 318 U.S. 515, 521 (1943).

Executory contract means "a contract 'on which performance is due to some extent on both sides.' " *Bildisco*, 465 U.S. at 522 n.6 (quoting from H.R. Rep. No. 95-595, at 347 (1977)); Countryman, *Executory Contracts in Bankruptcy*, 57 Minn. L.

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with a retiree concerns the treatment of its unsecured claim. Not only is that not possible or practicable before negotiation of the chapter 11 plan, but the debtor is barred by 11 U.S.C. § 1125(b) from soliciting retirees' acceptance of the proposed treatment of their claims before the court approves a disclosure statement in respect of the debtor's chapter 11 plan. That further compels the conclusion that section 1113 can not apply to non-executory collective bargaining agreements.

Rev. 439, 460 (1973) (Part I) (Part II appears at 58 Minn. L. Rev. 479 (1974)). Under the Collective Bargaining Agreement at bar, Unimet owes performance (payment of life and medical insurance premiums) to the retirees, while there are no obligations flowing from the retirees to the estate and there are no employees who owe any performance to the estate.

The reason for only assuming and rejecting executory contracts is simple. Rejection of a contract is a breach that gives rise to a general prepetition claim against the estate. Bankruptcy Code section 365(g). If a prepetition contract starts out as nothing but a claim against the estate, such as the retirees' benefit claims against Unimet, rejection has no effect because the prepetition contract already is a prepetition claim.

In respect of assumption, a debtor may only assume a contract if the benefits the estate obtains outweigh the contract's burdens on the estate. If the contract has no benefits flowing to the debtor, there is no reason to assume. Conversely, if a contract only has benefits flowing to the debtor and no obligations of the debtor (such as an account receivable owing to the debtor), then there is nothing for the court to approve. Rather, the contract is simply an asset that the debtor may use or liquidate.

In subjecting the non-executory Collective Bargaining Agreement in the case at bar to the operation of Bankruptcy Code section 1113, the court below also impermissibly ignored the remainder of the statutory scheme and erroneously produced a result incompatible with the rest of the law. *See United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assoc., Ltd.* 108 S. Ct. at 630; *Duparquet Co.* v. *Evans*, 297 U.S. 216, 218 (1936).

For instance, in a chapter 7 liquidation case, the Collective Bargaining Agreement would constitute a general unsecured prepetition claim against the Unimet estate, 11 U.S.C. § 101(4) (definition of claim), that would share on a pro rata basis with all similarly ranked claims *after* payment in full of all priority

and administrative claims set forth in Bankruptcy Code sections 503 and 507. *See* Bankruptcy Code section 726(a).[4]

Unimet is effectuating a liquidating chapter 11 reorganization, *see* Bankruptcy Code section 1123(b) (4), which has much the same effect as a chapter 7 case except that the estate saves the expense of a chapter 7 trustee. But, due to the decision below, the retirees' claims are paid in full in Unimet's chapter 11 case notwithstanding that the business operations have been sold as would be the case in chapter 7. There is no rational explanation for the disparate and anomalous treatment of the same retirees' claims in chapter 7 cases and liquidating chapter 11 cases, which disparate treatment is created solely by the decision below. Clearly, had Congress wanted to favor union retirees' claims in chapter 11 cases after the business operations have been sold, it would have provided for them in chapter 7 cases too.

Notably, Congress has legislated which claims should obtain priority in both chapter 7 and 11 cases. All priority and administrative claims are set forth in sections 503 and 507 of the Bankruptcy Code, which sections are applicable in both chapter 7 and 11 cases. Bankruptcy Code section 103(a). Retiree claims are not granted any priority whatsoever![5] Thus, the decision below, by compelling Unimet to pay union retiree benefit claims now, grants union retirees a superpriority claim ahead of every Congressionally created priority in the Bankruptcy Code.

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4 Notably, this result would occur even if the Collective Bargaining Agreement were an executory contract. In chapter 7 cases, executory contracts are automatically rejected in sixty days unless assumed or rejected before then or unless the time is extended. *See* Bankruptcy Code section 365(d)(1). Because there is no reason to assume a debt to retirees, the result in chapter 7 where Bankruptcy Code section 1113 does not apply is that the retirees' claim is treated with all other general prepetition unsecured claims.

5 There is one exception. When an employee accrues benefits through his or her employment during the 180 days prior to commencement of the chapter 7 or 11 case, the employee is entitled to a third or fourth priority of up to $2000. Bankruptcy Code section 507(a)(3)-(4). If the employee retires during or after those 180 days, then the new retiree would retain its priority claim.

Bankruptcy Code section 507(a), defines those expenses and claims against the chapter 11 estate that are entitled to priority in distribution, and the order of the priority. *Trustees of Amalgamated Ins. Fund* v. *McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986). Administrative expenses allowed under Bankruptcy Code section 503(b) are given first priority under section 507. Congress granted priority to administrative expenses to facilitate efforts of the trustee or debtor in possession to rehabilitate the business to benefit all the estate's creditors. *In re Mammoth Mart, Inc.*, 536 F.2d 950, 953 (1st Cir. 1976). When the Bankruptcy Code provides a priority, it is narrowly construed to preserve for creditors as much of the estate as possible. *See Otte* v. *United States*, 419 U.S. 43 (1974).

By requiring Unimet to pay its retired union employees' insurance premiums in full, the Sixth Circuit has granted administrative expense status to claims that provide no postpetition benefit to the estate. Indeed, by compelling payment of retiree benefits under 11 U.S.C. § 1113, the Sixth Circuit has afforded union retirees a superpriority status ahead of all other creditors that is nowhere to be found within the priority scheme of 11 U.S.C. § 507. In fact, the decision below subordinates the priorities Congress legislated to the superpriority that the Sixth Circuit legislated. The Sixth Circuit's decision results in blatant inequity—the preference of union retirees over non-union retirees and all administrative claimants. Had Congress intended 11 U.S.C. § 1113 to create such a result, it would have expressly included union retirees' claims at the top of the statutory scheme of Bankruptcy Code sections 503 and 507.[6]

The circumstances surrounding the enactment of section 1113 of the Bankruptcy Code provide no support for the Sixth Circuit's holding that retiree benefits in nonexecutory agreements

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6 Indeed, H.R. 1040, 100th Cong., 1st Sess. (1987) annexed as Appendix J, aptly demonstrates Congress' ability to expressly grant priority to claims of retirees. If enacted, 11 U.S.C., § 507(a) would create a fifth priority for payments to all employee health insurance plans, pension plans or life insurance plans with varied limits as to the dollar amount of priority. Notably, the legislation does not favor union retirees over nonunion retirees as the court below does. Such legislation however would only become effective on the date of its enactment.

were included. Congress did not agree on a Committee Report to accompany section 1113; there were only statements read into the Congressional Record by various members of Congress on the date the Bankruptcy Amendments and Federal Judgeship Act of 1984 were enacted. Pub. L. No. 98-353, 98 Stat. 333-392 (1984). The Supreme Court frequently cautions against placing reliance on such statements.[7]

In its decision, the court below relied on statements of Senator Moynihan and Congressman Vento to buttress its perception of Congressional intent to include retirees within 11 U.S.C. § 1113. "Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely." *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988).

Indeed, the enactment of new Bankruptcy Code section 1114[8] on June 16, 1988 shows that Congress never intended Bankruptcy Code section 1113 to apply to retiree claims based on nonexecutory contracts and never intended to favor union retirees over nonunion retirees. Pursuant to new section 1114 retiree claims are treated separately from executory collective bargaining agreements and are not subject to assumption or rejection. Additionally, retiree benefit claims of union retirees are not exalted over those of nonunion retirees. Congress has granted retiree claims of union and nonunion retirees the same priority under Bankruptcy Code sections 503 and 507. In doing so, Congress demonstrates that it had previously granted neither priority.

Contrary to new Bankruptcy Code section 1114, the court below interpreted section 1113 to apply to nonexecutory contracts for retiree benefits and to grant union retiree claims priority

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7 *See, e.g., Garcia* v. *United States*, 469 U.S. 70 (1984); *Zuber* v. *Allen*, 396 U.S. 168 (1969); *Weinberger* v. *Rossi*, 456 U.S. 25 (1982).

8 H.R. 2969, 100th Cong., 1st Sess. (1987) annexed as appendix K passed by both the Senate and House of Representatives was presented to President Reagan for his signature on June 7, 1988 and ultimately signed. It enacts new Bankruptcy Code section 1114.

over nonunion retiree claims and over all administrative claims. Congressional intent shows that the court below misinterpreted section 1113. *Cf. In re Stirling Homex Corp.*, 579 F.2d 206, 214-15 (2d Cir. 1978), *cert. denied sub nom. Jezarian* v. *Raichle*, 439 U.S. 1074 (1979); *Selby* v. *Ford Motor Co.*, 590 F.2d 642, 648-49 (6th Cir. 1979).

In short, the Sixth Circuit erroneously legislated that 11 U.S.C. § 1113 applies to nonexecutory collective bargaining agreements, creating a super-priority that Congress has not enacted in 11 U.S.C. § 507. The decision below creates an inequity in treatment of classes of creditors and, as demonstrated by the enactment of 11 U.S.C. § 1114, is contrary to Congressional intent.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the United States Supreme Court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: June 29, 1988

Appendix A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 87-3211.

Argued Jan. 25, 1988.

Decided March 22, 1988.

In Re UNIMET CORPORATION,

Debtor.

UNITED STEELWORKERS OF AMERICA,

Plaintiff-Appellant,

v.

UNIMET CORPORATION,

Defendant-Appellee.

James S. Gwin, Gutierrez, Mackey & Gwin Co., Canton, Ohio, Paul Whitehead (argued), United Steelworkers of America, Pittsburgh, Pa., for plaintiff-appellant.

Lee D. Powar, Mark E. Staib (argued), Harry D. Mercer, Eric D. Fingerhut, Harlin, Loeser, Freedheim, Dean & Wellman Co., Cleveland, Ohio, David M. Hunter, Jeffrey T. Heintz, Brouse & McDowell, J. Bruce Hunsicker, Akron, Ohio, for defendant-appellee.

Before

MILBURN and GUY, *Circuit Judges*,
and CONTIE, *Senior Circuit Judge*.

MILBURN, *Circuit Judge.*

Plaintiff-appellant United Steelworkers of America ("United Steelworkers" or "Union") appeals from the post-judgment order of the district court holding that defendant-appellee Unimet Corporation ("Unimet"), the debtor-in-possession under Chapter 11 of the Bankruptcy Code, was not required to pay insurance premiums for retiree benefits under the terms of a collective bargaining agreement. For the reasons that follow, we reverse the judgment of the district court to the extent that it held that 11 U.S.C. § 1113's protection does not apply to retirees covered by provisions in a collective bargaining agreement.

I.

Unimet formerly operated a manufacturing plant in Canton, Ohio. On November 7, 1983, Unimet entered into a three-year collective bargaining agreement with United Steelworkers. The agreement required Unimet to pay one-half of the premiums for certain retirees' health insurance and the full amount of the premium for all retirees' life insurance.

However, on May 11, 1984, all Unimet employees at the Canton facility were laid off when the company closed its plant. Thereafter, on March 8, 1985, Unimet sought protection under Chapter 11 of the Bankruptcy Code. At that time, Unimet's only remaining obligation under the collective bargaining agreement was the payment of insurance premiums on behalf of the retirees.

After Unimet closed the Canton facility, it informed United Steelworkers that it wished to eliminate the health and life insurance benefits for retirees. The union rejected this proposal, but advised Unimet that it was willing to consider any further modifications the company wished to propose. Unimet responded by filing a motion in the bankruptcy court to reject the collective bargaining agreement pursuant to 11 U.S.C. § 1113.

On August 6, 1985, the bankruptcy court issued an order denying Unimet's motion to reject the collective bargaining agreement because it failed to carry its burden of proof with regard

to the factors enumerated in 11 U.S.C. § 1113(b). No appeal was taken from that order.

Nevertheless, Unimet continued to advocate the position that the Bankruptcy Code did not authorize payment of the insurance premiums required by the collective bargaining agreement. In order to protect itself from the possibility that other creditors would challenge an attempt to pay the premiums required by the unrejected collective bargaining agreement, Unimet filed an application to pay the premiums as administrative expenses pursuant to 11 U.S.C. § 503(b). It then proceeded to, in effect, argue against the motion by advocating the position that payment of retiree insurance premiums could not be characterized as an administrative expense. In response, United Steelworkers argued that because section 1113 applies to all provisions of a collective bargaining agreement, Unimet's failure to carry its burden of proof under subsection 1113(b) rendered it liable for premium payments under the terms of the contract.

In an order entered on September 27, 1985, the bankruptcy court adopted the position advanced by Unimet. As an initial matter, the bankruptcy court retreated from the premise upon which its August 6, 1985, judgment was based. Rather than adhering to its initial decision that Unimet was required to comply with the collective bargaining agreement because the requirements of 11 U.S.C. § 1113(b) had not been satisfied, the bankruptcy court concluded that section 1113 does not protect the collectively bargained rights of retirees. To support this conclusion, the bankruptcy court reasoned that section 1113 speaks in terms of "employees." Because retirees are not "employees" for the purpose of section 8 of the National Labor Relations Act, *see Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971), the bankruptcy court concluded that they should not be considered "employees" for the purpose of analysis under 11 U.S.C. § 1113.

After concluding that section 1113 did not provide authority for the continuation of retiree insurance benefits, the bankruptcy court considered whether these expenses were properly characterized as administrative expenses under 11 U.S.C. § 503. Because it concluded that this obligation did not arise af-

ter the filing of the petition and was not necessary for the preservation of the estate, the bankruptcy court held that the insurance premium payments were not expenses of administration. Accordingly, Unimet was denied authorization to make the premium payments as required by the collective bargaining agreement.

United Steelworkers then appealed to the district court, which reversed the judgment of the bankruptcy court on November 18, 1986. The basis for the district court's decision was its belief that H.R. 5490 amended section 1113(f) to explicitly provide protection for retirees.[1] H.R. 5490, however, was never enacted into law.

Accordingly, Unimet filed a motion to reconsider the district court's November 18, 1986, judgment. Unimet pointed out that H.R. 5490, although passed by the House of Representatives, had never been passed by the Senate. It also pointed to other legislative activity which it contended supported the conclusion that section 1113 does not apply to retirees.

On January 21, 1987, the district court entered a post-judgment order adopting Unimet's position. It affirmed the judgment of the bankruptcy court that 11 U.S.C. § 1113 does not apply to retirees and that the insurance premiums were not properly characterized as administrative expenses. It is from this judgment that United Steelworkers appeals, arguing that 11 U.S.C. § 1113 applies to retirees, and that subsequent legislative activity should have no bearing on this court's decision.

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1 H.R. 5490 provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1113(f) of title 11, United States Code, is amended by inserting "(including any provision relating to benefits for retired former employees)" after "provisions" the first place it appears.

132 Cong.Rec. H8551 (daily ed. September 29, 1986).

II.

A.

A discussion of 11 U.S.C. § 1113 is not complete without consideration of the circumstances precipitating its enactment. In 1984, the Supreme Court decided *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). Although the Court unanimously agreed that an unexpired collective bargaining agreement is an executory contract which could be rejected pursuant to 11 U.S.C. § 365(a), it split 5–4 on the issue of whether the debtor-in-possession could be found guilty of an unfair labor practice if it rejected the agreement prior to court approval. The majority concluded that the imposition of such sanctions would deprive the debtor-in-possession of the flexibility contemplated by the Bankruptcy Code.

> [T]he Board is precluded from, in effect, enforcing the terms of the collective-bargaining agreement by filing unfair labor practice charges against the debtor-in-possession for violating § 8(d) of the NLRA. Though the Board's action is nominally one to enforce § 8(d) of that Act, the practical effect of the enforcement action would be to require adherence to the terms of the collective bargaining agreement. But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again. Consequently, Board enforcement of a claimed violation of § 8(d) under these circumstances would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space. We conclude that from the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA § 8(d).

Bildisco, 465 U.S. at 532, 104 S.Ct. at 1199 (citation omitted).

The legislative response to *Bildisco* was swift. Only five months after the decision, Congress enacted 11 U.S.C. § 1113

as part of the 1984 amendments to the Bankruptcy Code.[2] *Subsection 1113(a) provides* that the trustee or debtor-in-possession "may assume or reject a collective bargaining agreement only in accordance with the provisions of this section." *Subsection 1113(b) requires* the trustee or debtor-in-possession to make a proposal to the union providing for employee benefit modifications that are necessary to permit the reorganization of the debtor and to assure that all creditors, the debtor, and all other affected parties are treated fairly. The debtor must also provide the union with all information necessary to effectively evaluate the proposal. *Subsection 1113(b) further requires* meetings between the debtor-in-possession and the union.

Subsection 1113(c) provides that the court shall approve an application for rejection of the collective bargaining agreement only if it finds that the debtor-in-possession has made a proposal that fulfills the requirements of subsection (b); that the union has refused to accept the proposal without good cause; and that the balance of the equities favors rejection of the contract.

Subsection 1113(d) contains a timetable during which the bankruptcy court must rule on the petition. *Subsection 1113(e) contains a provision allowing emergency relief* as necessary to prevent irreparable damage to the debtor's business. Finally, *subsection 1113(f) provides that "[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section."* (Emphasis supplied).

Two separate and distinct lines of argument are presented by the parties for the court's consideration. The first line of argument concerns the literal interpretation of section 1113. United Steelworkers argues that subsection 1113(f) means what it says—that the debtor-in-possession, Unimet, was required to comply with *all* provisions of the collective bargaining agreement *unless and until rejection was permitted by the court.* Because Unimet was unable to carry its burden of proof with regard to the factors enumerated in subsection 1113(b)(1),

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2 The full text of 11 U.S.C. § 1113 is attached hereto as Appendix I.

United Steelworkers insists that rejection should have been denied and Unimet required to make premium payments as provided for by the contract.

On the other hand, Unimet argues that 11 U.S.C. § 1113 was narrowly drafted in response to the specific problem presented in *Bildisco*, and that it does not even apply to the circumstances of the present case. Unimet further contends that the insurance premiums required under the collective bargaining agreement are not properly payable as administrative expenses, a contention with which the union does not appear to differ. Accordingly, Unimet argues that the Bankruptcy Code contains no authorization for continuation of the premium payments, and thus the bankruptcy court and the district court correctly concluded that Unimet was not required to make those payments even though required by the collective bargaining agreement.

The second line of argument concerns the significance, if any, of recent legislative activity regarding section 1113. United Steelworkers argues that certain recent legislative developments have absolutely no effect on the interpretation of section 1113 and thus should not be considered by the court in its disposition of the present case. However, Unimet argues that Congress has had ample opportunity to enact an amendment to section 1113 which would explicitly state that retiree benefits are included within the scope of section 1113. Because Congress had declined to do so, Unimet argues that this court cannot make a policy decision that Congress itself has declined to make.

B.

Unimet argues that we should adopt a narrow interpretation of *Bildisco* and the congressional response thereto. Accordingly, Unimet contends that we should affirm the holdings of the district and bankruptcy courts that 11 U.S.C. § 1113 does not apply to retiree benefits.

According to Unimet, the *Bildisco* decision announced a narrow rule designed to apply to a problem not presented by this dispute. Specifically, Unimet argues that *Bildisco* held *only* that an employer was free to unilaterally alter the terms of a collective bargaining agreement without fear of subjecting itself to li-

ability for violations of sections 8(a)(5) and 8(d) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(5) and 158(d). Unimet contends that as retirees are not "employees" within the meaning of section 8 of the NLRA, their rights are not mandatory subjects of bargaining and thus are not enforceable by resort to unfair labor practice proceedings. *See Pittsburgh Plate Glass Co.*, 404 U.S. at 157, 92 S.Ct. at 386. Consequently, Unimet contends that the Court in *Bildisco* was not concerned with enforcement of retirees' rights, and that the legislative response to *Bildisco* should be interpreted to be equally unconcerned with those rights.

Our reading of section 1113 and its legislative history[3] convinces us that this argument is untenable. First and foremost, the express language of section 1113(f) makes no distinction between mandatory and permissive subjects of bargaining. Nor does this subsection purport to protect only "employees." Rather, section 1113(f) states that "[n]o provisions of this title shall be construed to permit a trustee to unilaterally terminate or alter *any provisions* of a collective bargaining agreement prior to compliance with the provisions of this section." (Emphasis supplied). Thus, the plain language of the statute is directly contrary to Unimet's argument.

Second, there is some indication that *Congress* believed that *Bildisco* rendered vulnerable the benefits bargained for on behalf of retirees. Senator Moynihan expressed concern that, in the wake of *Bildisco, "[a]ccrued pension rights*, for which employees may have worked years to accumulate, also may be eliminated by a single declaration by the company." 130 Cong. Rec. S8900 (daily ed. June 29, 1984) (emphasis supplied). Congressman Vento criticized *Bildisco* because it permitted debtors-in-possession to unilaterally modify "the jobs, salaries and wages, health and life insurance benefits, fringe benefits, *and pension rights* of every worker." 130 Cong.Rec. H1831 (daily ed. March 21, 1984) (emphasis supplied). Senator Packwood, one of the sponsors of the legislation, expressed his belief that *section 1113 would require the employer to comply with "all*

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3 Because no official report accompanied 11 U.S.C. § 1113, the legislative history contains only the statements read into the Congressional Record.

the provisions of the contract." 130 Cong.Rec. S6190 (daily ed. May 22, 1984) (emphasis supplied). While these statements cannot, in isolation, fully support our conclusion, they do shed some light upon congressional interpretation of *Bildisco* and the perceived need for a broadly sweeping response.

A change in the language of the statute during the drafting process also provides support for United Steelworkers' argument. When the legislation was passed by the House, it provided that "[n]o provisions of this title shall be construed to permit the trustee unilaterally to terminate or alter any of the wages, *hours, terms and conditions* established by a collective bargaining agreement." 130 Cong.Rec. H1842 (daily ed. March 21, 1984) (emphasis supplied). The language concerning "wages, hours, terms and conditions" of employment closely parallels the language of section 8 of the NLRA with regard to mandatory subjects of bargaining. Had this language appeared in section 1113 as enacted, its adoption arguably would have supported Unimet's position that section 1113 applies only to those portions of the collective bargaining agreement enforceable through unfair labor practice proceedings.

However, in section 1113 as finally enacted, the "terms and conditions" language has been replaced with less restrictive language prohibiting modification of *any provision* of the collective bargaining agreement without prior court approval. Although Unimet argues that reliance on this change "is at the very least irresponsible," we believe that it does provide some support for the union's position.[4]

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4 The union also places heavy reliance on the Second Circuit's decision in *In re Century Brass Products, Inc.*, 795 F.2d 265 (2d Cir.), *cert. denied*, _____ U.S. _____, 107 S.Ct. 433, 93 L.Ed.2d 383 (1986). In *Century Brass*, the union argued that it had "good cause" to reject the employer's contract modifications with regard to retiree rights because the union was not authorized to bargain about those rights. The Second Circuit disagreed, concluding that the union has a duty to represent retirees for the purposes of negotiation under section 1113. The court was influenced, at least in part, by the notion that the retiree benefits in *Century Brass* "vitally affected" the interests of active employees within the meaning of *Pittsburgh Plate Glass, supra*. That factor is not present in the case now before us, and thus we must decide whether the absence of this factor renders the provisions of section 1113 inoperable. We conclude, for the reasons discussed above, that it does not.

We conclude that the union's argument regarding the scope of section 1113 is the stronger one. Accordingly, the judgment of the district court, to the extent that it held that section 1113's protections do not apply to retirees, is reversed.

C.

Unimet also argues, as the district court ruled, that the insurance premiums are not properly payable as administrative expenses, and thus it has no duty to pay them. In order for an obligation to be characterized as an administrative expense pursuant to 11 U.S.C. § 503(b), two criteria must be satisfied. First, the consideration supporting the right to payment must have been given to the debtor-in-possession. Second, the consideration must have benefitted the estate. *See, e.g., In re White Motor Corp*, 831 F.2d 106 (6th Cir.1987); *In re Jartran, Inc.*, 732 F.2d 584 (7th Cir.1984).

Assuming without deciding that insurance premium payments on behalf of retirees are not properly payable as administrative expenses, our conclusion that 11 U.S.C. § 1113 encompasses retiree benefits leads to the conclusion that qualification as an administrative expense is not necessary for the union to prevail. As discussed above, section 1113 unequivocally prohibits the employer from *unilaterally* modifying *any provision* of the collective bargaining agreement.[5] Accordingly, we hold that Unimet cannot escape its obligations in this regard merely because the requirements of section 503 arguably have not been satisfied.

D.

The final issue for our determination is the effect, if any, of recent legislative develpments upon the disposition of the present case. As the district court noted in its post-judgment or-

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5 For this reason, Unimet's reliance on *Trustees of the Amalgamated Insurance Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir.1986), is misplaced. The payment in *McFarlin's* was a statutorily imposed withdrawal liability, and not a payment required by a collective bargaining agreement subject to section 1113.

der, on October 19, 1986, Congress enacted Public Law 99-591, which provides in relevant part:

> (a) Notwithstanding any provision of chapter 11 of title 11, United States Code, the trustee shall pay benefits until May 15, 1987 to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.
>
> (b) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code, in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986.

Act of October 30, 1986, Pub.L.No. 99-591, 1986 U.S.Code Cong. & Admin.News (100 Stat.) 3341-74.

It is clear that this enactment, by its terms, does not apply to the Unimet bankruptcy. The district court apparently believed that, because the legislation does not apply to Unimet, it served as further support for the conclusion that section 1113 does not provide authorization for the payments at issue in the present case.[6] We disagree.

An examination of the legislative history surrounding Public Law 99-591 indicates that it was enacted as a stop gap measure designed primarily to assure the continuation of benefits to retirees affected by the LTV bankruptcy proceedings. The spon-

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6 The district court also relied upon a statement issued by the President upon the signing of Public Law 99-656, which apparently extended the applicability of Public Law 99-591 to an entity unrelated to Unimet. *See* Act of November 14, 1986, Pub.L. No. 99-656, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 3668. The President expressed reservations about the constitutionality of Public Law 99-656 insofar as it appeared to be a bankruptcy law of nonuniform application. The presidential statement clearly has no relevance to these proceedings, and, to the extent that the district court relied upon it, the court was in error.

sors of the legislation unequivocally stated that it was not designed to affect interpretation of section 1113.

> MR. THURMOND. . . . This provision will provide this protection until May 15, 1987, in order to give Congress time to act on the broader question of how retiree benefits are to be treated under the Bankruptcy Code, and especially under section 1113.
>
> This new provision is not to be read or interpreted as affecting the interpretation of section 1113 of the Code. . . . It was only with this understanding that I have consented to allow the Senate to consider this amendment in the closing days of the session.
>
> Mr. President, I want to make it completely clear, as Senators Heinz and Metzenbaum understand, that this amendment does not affect the interpretation of § 1113 in any way.

132 Cong.Rec. S14872 (daily ed. October 3, 1986). Thus, even if we were willing to entertain the notion that legislative activity *subsequent to* a statutory enactment is a reliable indicator of congressional intent in enacting legislation, given the unqualified pronouncement of the sponsors of Public Law 99-591, we are unwilling to accord it any weight in our analysis.

III.

In sum, our reading of 11 U.S.C. § 1113 leads us to the conclusion that Congress intended to give broad protection to collectively bargained for rights which are threatened by a corporate reorganization under Chapter 11 of the Bankruptcy Code. Our conclusion that 11 U.S.C. § 1113 applies to all provisions of a collective bargaining agreement does no violence to the plain language of the statute or the legislative history as we perceive it. By requiring the debtor-in-possession to establish that the equities militate in favor of rejection of the benefits collectively bargained for on behalf of retirees, we believe we strike the appropriate balance between the interests of the debtor-in-possession in effectuating a reorganization and the interests of retirees who have achieved through the collective bargaining

process some measure of security. Accordingly, the judgment of the district court is REVERSED to the extent that it held that 11 U.S.C. § 1113 does not protect the interests of retirees. This case is REMANDED to the district court for further proceedings consistent with this opinion.

Appendix 1

REORGANIZATION

SECTION 1113 (11 U.S.C. § 1113)

§ 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to

confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could

compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 85-3333A

UNITED STEELWORKERS OF AMERICA,

Plaintiff

v.

UNIMET CORPORATION,

Defendant

POST JUDGMENT ORDER

LAMBROS, DISTRICT JUDGE

This action arises on the motion of debtor Unimet for reconsideration of this Court's memorandum opinion and order of November 8, 1986. In that Order, this Court entered judgment authorizing debtor to pay as an administrative expense certain retiree's insurance benefits due under the collective bargaining agreement between Unimet and the United Steelworkers of America.

In rendering judgment, this Court relied upon recent legislative action which appeared to clarify the provision at issue here. 11 U.S.C. § 1113(f). In a second supplemental brief filed by the Union on November 5, 1986, the Union stated:

> A copy of House Report 99-917 is attached hereto. The language adopted by Congress in that report makes it clear that § 1113 is applicable to retiree health and life insurance benefits owing under (the) collective bargaining agreement.

However, what the November 18, 1986 Order of this Court utilized as legislative history does not accurately reflect Joint House Resolution 738 which was duly enacted into law, and signed by the President. Moreover, in a statement issued November 14, 1986 the President expressed an opinion relevant to this Court's present consideration. Because of the recent clarification of the legislative and executive activity on this issue and for the following reasons, the Undersigned hereby vacates the judgment and memorandum opinion and order entered November 18, 1986.

Joint House Resolution 738 enacted on October 18, 1986, provides as follows:

> Sec. 608. (a) Notwithstanding any provision of chapter 11, of title 11, United States Code, the trustee shall pay benefits until May 15, 1987 to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.
>
> (b) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code, in which a plan for reorganization has not been confirmed by the Court and in which any such benefit is still being paid on October 2, 1986, and in cases that became subject to chapter 11, title 11, United States Code, after October 2, 1986.
>
> (c) This section shall not apply during any period in which a case is subject to chapter 7, title 11, United States Code.

The new law clearly provides that its terms apply only to cases which became subject to Chapter 11 of the Bankruptcy Code on March 8, 1985. Accordingly, the new amendment to 11 U.S.C. § 1113, Joint House Resolution 738, does not apply in this action.

In a statement issued November 14, 1986, the President made the following statement regarding the recent amendment:

> Although I am signing this bill, I am very troubled by the inclusion of an unrelated, last-minute amendment to the Bankruptcy Code. The Congress' decision to link such provisions to otherwise desirable and useful legislation is but one example of the highly objectionable practice of combining unrelated legislation in a single bill. This practice, at a minimum, violates the spirit of the Constitution by restricting the President's veto power.
>
> Under the Constitution, the Congress is authorized to establish uniform laws on the subject of [B]ankruptcies throughout the United States. U.S.C. Const. art. 1, sec. 8, cl. 4. Section 2 of the bill requires that bankruptcy trustees in specified cases continue to pay certain benefits to retired former employees, and subsection (b)(3) identifies such a case by reference to the circumstances of its bankruptcy proceedings. This amounts to a private bankruptcy law, which is beyond the Congress' constitutional authority to enact, and the provision is accordingly without force or effect. I am advised by the Attorney General that, because of the unconstitutional nature of this provision, it should not be defended.

* * *

It must be noted that Joint House Resolution 738 was also incorporated into H.R. 5363, Public Law No. 99-656. In light of the language of the amendment as enacted as well as the Presidents' signing statement, and upon careful reconsideration, the Court upholds the conclusion of Bankruptcy Judge Williams that the debtor is without authority under the Bankruptcy Code to make the payments as administrative expenses.

Where there is no genuine issue as to any material fact, the final Orders of the Bankruptcy Court must be upheld if that court "correctly applied the substantive law to the uncontested facts," *In re Ashby Enterprises Ltd.*, 47 Bankr. 394 (DDC 1985). In this action the facts are undisputed. Debtor formerly operated a plant in Canton, Ohio, at which it manufactured tubular light poles. Certain employees at the Canton plant were covered by a collective bargaining agreement. All employees were terminated when the plant closed on May 11, 1984. Debtor

was obligated until the expiration of the bargaining agreement on November 6, 1986, to pay one-half of the premium on a retirees' optional health insurance program, and to maintain a retirees' life insurance program providing "a nominal lump sum payment upon the retiree's death." *In re Unimet Corp.*, Case No. 685-00240, slip op. at 1 (Bankr. N.D. Ohio, August 6, 1985). The union seeks to force debtor to continue to pay the premiums required to maintain the retirees' insurance benefits during the pendency of the reorganization proceedings. The union seeks to require the debtor to make such payments ahead of any payments to any of the debtor's other creditors and claimants.

The procedural background of this action includes the June 11, 1985 motion of the debtor to reject the collective bargaining agreement under 11 U.S.C. § 1113 of the Bankruptcy Code. Pursuant to a hearing on July 23, 1985, the Bankruptcy Court on August 6, 1985 issued an Order which denied the debtor's motion to reject, as the debtor had not complied with the requirements set forth in 11 U.S.C. § 1113. Debtor did not appeal that Order.

On August 16, 1985, debtor filed a pleading captioned as an "Application for Order to Pay as Administrative Expenses Certain Insurance Premiums." In that pleading, debtor asked the Court to deny the Application. According the debtor, it does not have the authority under the Bankruptcy Code to make the payments as administrative expenses. Consequent to a hearing on debtor's application, the Bankruptcy Court entered an Order on September 27, 1985, denying debtor's application. Bankruptcy Judge Williams concluded that the payments were not required by the Bankruptcy Code, under either 11 U.S.C. § 503(b)(1)(a) or 11 U.S.C. § 1113.

In the within action, all of the debtor's employees had been laid off prior to the filing of the petition. Under 11 U.S.C. § 503(b)(1)(a), administrative expenses are:

> (1)(a) the actual, necessary, costs and expenses of preserving the estate, including wages, salaries, or commissions for services, rendered after the amendment of the case
>
> . . .

In this case, the retirees provide no services or other benefit to the estate. Without clear Congressional justification to the contrary, this Court will not accord a superpriority to retires over other creditors. Accordingly, Bankruptcy Judge Williams correctly concluded that the payments in question were not required by the Bankruptcy Code, under either 11 U.S.C. § 503(b)(1)(a) or 11 U.S.C. § 1113.

IT IS SO ORDERED.

/s/ THOMAS D. LAMBROS
Thomas D. Lambros
United States District Judge

DATED: January 18, 1987

Appendix C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Reorganization Proceedings

Case No. 685-00240

IN THE MATTER OF:

UNIMET CORPORATION

Debtor.

MEMORANDUM OF DECISION

Made at Canton, Ohio this 27th day of September, 1985.

Appearances: Harry D. Mercer, Esq., of Hahn, Loeser, Freedheim, Dean & Wellman Co. L.P.A., Cleveland, Ohio, counsel for the debtor; James S. Gwin, Esq., of Gutierrez, Mackey & Gwin Co., L.P.A., Canton, Ohio, counsel for Local 1590, United Steelworkers of America, AFL-CIO.

I.

This matter comes before the court upon the application of the Unimet Corporation (Unimet or debtor) for authority to pay as administrative expenses certain hospital, surgical and life insurance premiums on behalf of retired employees of the debtor's Tubular Products Group Division. The debtor's obligation to pay these premiums arises out of the terms of a collective bargaining agreement entered into with the United Steelworkers of America, AFL-CIO (Union) on November 7, 1983. The labor contract itself was the subject of an earlier application brought by the debtor pursuant to 11 U.S.C. § 1113 which sought to reject the terms of the agreement in its entirety.

On August 6, 1985 this court denied that application, finding that the debtor had not complied with the good-faith bargaining requirements that Section 1113 mandates.

Now the debtor is before us contending that continued compliance with the terms of the agreement, without a specific court order to do so, would violate 11 U.S.C. § 503(b)(1)(A) as the insurance premiums do not qualify as an administrative expense entitled to priority payment under Section 507(a). Indeed, the debtor argues that if it is forced to abide by the terms of the labor contract, the payments would confer upon the retirees a "super" administrative expense priority prejudicial to the interests of all other bona fide administrative claimants. In addition, the debtor contends that since the premiums are payable under the terms of a pre-petition contract, under no circumstance can a pre-petition obligation be construed as an ordinary business expense under Section 363(c)(1). Finally, the debtor alleges that any claim that the premiums are deserving of administrative priority must fail as the retirees are performing no services which are necessary for the preservation of estate assets.

The Union's position emphasizes the implications of Section 1113(f).[1] In its view, any alteration or modification of a collective bargaining agreement is forbidden unless or until the court finds that the debtor has complied with all of the procedural requirements of Section 1113. The Union, therefore, views the court's order of August 6 to be a dispositive finding that the debtor has not met its burden and that the provisions of the labor contract remain binding on both parties until such time as the debtor files and successfully sustains a subsequent application to reject.

The matter came on for hearing on September 19, 1985 at which time the court heard the arguments of counsel. The parties also requested, the opportunity to submit briefs, which was granted. It is upon these arguments and briefs that the within memorandum is based.

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1 "(f) No provision of this title [11 U.S.C. §§ 1 et seq.] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section."

II.

The parties focus upon the applicability of Section 1113 to these proceedings. The statute is new[2] and is predicated upon the Supreme Court decision in *NLRB v. Bildisco & Bildisco*, ____ U.S. ____, 79 L. Ed. 2d 482, 104 S. Ct. 1188 (1984) (Bildisco). It acknowledges that the competing interests of a Chapter 11 reorganization and a collective bargaining agreement covered by the National Labor Relations Act (NLRA) (29 U.S.C. §§ 151 et seq.) must be balanced by the bankruptcy court whenever it is presented with an application to reject a labor contract. *Bildisco, supra*, 79 L.Ed. 2d at 495. Indeed, it was this keen Congressional deference to the rights of workers under collective bargaining agreements which prompted the drafters to adopt a statute which requires a strict negotiation process no different from that required by the NLRA. This negotiation process must take place *before* a bankruptcy court can decide whether or not the labor contract is necessary for a successful reorganization.[3] In essence then, the statute leaves intact the reasoning of Justice Rehnquist when he stated:

> The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would im-

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2 *See*, The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333, which took effect on October 10, 1984.

3 *See, e.g.*, The comments of Congressman Lungren at 130 Cong. Rec. H 7494 (daily ed. June 29, 1984) when he said:

> . . .[I]n an effort to respond to concerns that the circumstance of union workers was important in the determination of whether or not to reject a collective bargaining agreement, we placed a requirement in proposed section 1113(b)(1)(A) which mandates that, prior to filing an application before a bankruptcy court to reject a collective bargaining agreement, the debtor must first propose modifications in the union contract which are necessary to permit reorganization and which assure, to the extent possible given the facts available at the time, that all affected parties, namely the debtor, the creditors, *and all employees whose jobs are directly tied to the union contract*, are treated fairly and equitably under the proposal. (Emphasis added)

> pose on them, and the impact of rejection on the *employees*.

79 L. Ed. 2d at 496 (emphasis added).

The debtor now claims that, in light of the preceding case law and legislative history, Section 1113 is inapplicable to the labor contract before us. It urges that Section 1113 cannot be used by the Union as a statutory vehicle to elevate the payments due under this contract to an administrative expense status. Fundmental to the debtor's position is that the NLRA was intended to protect the interests of *active* employees only and excluded retirees from the collective-bargaining process.

That same conclusion was reached by the Supreme Court in *Allied Chemical & Alkali Workers of America vs. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (PPG). There the Court held that a unilateral mid-term modification to a labor contract which affected the medical benefits of retired employees was not an unfair labor practice as those retirees' benefits were not included in the mandatory list of subjects for collective-bargaining purposes under section 8(d) of the NLRA (29 USC § 158(d)). *Id.* at pp. 176-180. The basis for that holding was that the scope and purpose of the NLRA was designed to protect only those interests which vitally affect the "terms and conditions" of employment. *Id.* at 179. Since retired workers had ceased doing work for hire, they could not be construed as the type of "employee" within the meaning of the NLRA's collective-bargaining obligations. *Id.* at 172. In particular, Justice Brennan noted that:

> The inequality of bargaining power that Congress sought to remedy was that of the "working" man, and the labor disputes that it ordered to be subjected to collective bargaining were those of employers and their active employees. Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective bargaining obligations of the statute.

404 U.S. at 186.

The retiree, in light of *PPG*, *supra*, clearly cannot be said to be within that protected sphere of "employee" interests contemplated under Section 1113 of the Bankruptcy Code. Congress, when it considered the adoption of Section 1113, presumably was aware of the judicial interpretation of the NLRA as enunciated in *PPG*. Yet, there is nothing in the legislative history of Section 1113 nor in the express terms of the statute itself which suggested that the collective-bargaining interests being protected were being expanded to include those of retirees. Under these circumstances we cannot presume that Congress adopted the broader standard the Union suggests without some affirmative indication that such was indeed its preference. *Bildisco*, *supra*, 79 L. Ed. 2d at 495. *See also Lorillard v. Pons*, 434 U.S. 575, 55 L. Ed. 2d 40 (1978).

III

Having concluded, based on the issues now before us, that Section 1113 does not protect the interests of these retirees, we also conclude that the premiums currently due under this labor contract are not presently payable as administrative expenses. To hold otherwise would produce the anomalous result of providing the retirees with a remedy where no enforceable right exists.

Without the benefit of the special consideration given to collective-bargaining agreements under Section 1113 at its disposal, the Union is left to defend the debtor's alternate claim that the premiums do not qualify as administrative expense under Section 503(b)(1)(A).[4]

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4 Section 503(b)(1)(A) reads:

(b) After notice and a hearing there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case: . . .

In this respect, we are persuaded by that line of cases which states that administrative expenses are those which arise after the bankruptcy filing and are necessary for the preservation of the estate. *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976); *In re White Motor Corporation*, Case No. B80-3361 (Bankr. N.D. Ohio December 14, 1984, unrptd.); *In re Lumara Foods, Inc.*, 13 BCD 409, 50 B.R. 809 (Bankr. N.D. Ohio 1985). Neither criteria seems to be present within the facts of this case.

On the contrary, it is clear that as retirees, the claimants are providing no current services to the debtor. In fact, no employee, active or retired, except a limited number of executives and clerical workers, has provided any services since May 11, 1984, the day the debtor ceased its operations. Consequently, the court sees no basis to support a finding that the continued payment of these premiums will preserve what remains of the assets of this estate.

Similarly, the obligation to pay the premiums arose out of a collective-bargaining agreement entered into on November 7, 1983, approximately eighteen months prior to the filing of this Chapter 11 petition. The timing of when this obligation was incurred is crucial because when the Congress intended an administrative priority for pre-petition expenses, it did so in express terms. *See, e.g.*, Section 503(b)(3)(B). A search of the remaining provisions of Section 503 reveals no similar intent for the obligation currently before us. The court must therefore agree with the holding in *In re Jartran, Inc.* 732, F.2d 584 (7th Cir. 1984) and in *In the Matter of Baldwin-United Corp.*, 43 B.R. 443 (D.S.D. Ohio 1984) and find these premium payments undeserving of administrative priority under Section 503 of the Code.

IV.

In conclusion, the court, finding as it does that neither Section 1113 nor Section 503 of the Bankruptcy Code act to elevate the premium payments due under the collective-bargaining agreement of November 7, 1983 to an administrative expense priority of this estate, the debtor's application of August 16,

1985 for authority to pay these premiums as administrative expenses must be denied. An order consistent with the findings contained in this memorandum will be entered forthwith.

/s/ JAMES H. WILLIAMS

James H. Williams
United States Bankruptcy Judge

Appendix D

CHAPTER 1—GENERAL PROVISIONS

§ 101. Definitions

In this title—

(1) "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized;

(2) "affiliate" means—

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement;

(3) "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law;

(4) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured;

(5) "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761(9) of this title;

(6) "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case;

(7) "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose;

(8) "corporation"—

(A) includes—

(i) association having a power or privilege that a private corporation, but not an individual or partnership, possesses;

* * *

§ 103. Applicability of chapters

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.

(b) Subchapters I and II of chapter 7 of this title apply only in a case under such chapter.

(c) Subchapter III of chapter 7 of this title applies only in a case under such chapter concerning a stockbroker.

(d) Subchapter IV of chapter 7 of this title applies only in a case under such chapter concerning a commodity broker.

(e) Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.

(f) Except as provided in section 901 of this title, subchapters I, II and III of chapter 11 of this title apply only in a case under such chapter.

(g) Subchapter IV of chapter 11 of this title applies only in a case under such chapter concerning a railroad.

(h) Chapter 13 of this title applies only in a case under such chapter.

(i) Chapter 12 of this title applies only in a case under such chapter.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2555; Pub.L. 97-222, § 2, July 27, 1982, 96 Stat. 235; Pub.L. 98-353, Title III, § 423, July 10, 1984, 98 Stat. 369; Pub.L. 99-554, Title II, § 252, Oct. 27, 1986, 100 Stat. 3104.

* * *

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited

to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession whether or not such contract, or lease, prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the

debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the com-

mencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohitits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1307, or 1308 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112 or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

* * *

§ 503. Allowance of administrative expenses

(a) An entity may file a request for payment of an administrative expense.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commission for services rendered after the commencement of the case;

(B) any tax—

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(7) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under section 543 of this title; and compensation for the services of such custodian;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2581; Pub.L. 98-353, Title III, § 446, July 10, 1984, 98 Stat. 374; Pub.L. 99-554, Title II, § 283(g), Oct. 27, 1986, 100 Stat. 3117.

* * *

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay—

(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) to the extent of $2,000 for each such individual.

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $2,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b)(1) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b)(2) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fish-

erman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility—

but only to the extent of $2,000 for each such individual.

(6) Sixth, allowed unsecured claims of individuals, to the extent of $900 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(7) Seventh, allowed unsecured claims of governmental units; only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last

due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363

of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), or (a)(6) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2583; Pub.L. 98-353, Title III, §§ 350, 449, July 10, 1984, 98 Stat. 358, 374.

* * *

§ 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6) or (7) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112[1] 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the es-

1 So in original. Probably should be followed by a comma.

tate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2608; Pub.L. 98-353, Title III, § 479, July 10, 1984, 98 Stat. 381; Pub.L. 99-554, Title II, §§ 257(r), 283(s), Oct. 27, 1986, 100 Stat. 3115, 3118.

* * *

§ 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section, "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall

be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Added Pub.L. 98-353, Title III, § 541(a), July 10, 1984, 98 Stat. 390.

* * *

§ 1122. Classification of claims or interests

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2631.

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(7) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular

claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes,

including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director or trustee.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor had not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests; and

(5) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2631; Pub.L. 98-353, Title III, § 507, July 10, 1984, 98 Stat. 385.

Appendix E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C85-3333A

UNITED STEELWORKERS OF AMERICA,

Plaintiff-Appellant

—v.—

UNIMET CORPORATION,

Defendant/Appellee

MEMORANDUM OPINION AND ORDER

LAMBROS, DISTRICT JUDGE

This action arises on appeal from an Order of the United States Bankruptcy Court, denying debtor Unimet Corporation the authority to pay, as an administrative expense, insurance premium obligations on a retiree's optional health insurance program.

The facts are undisputed. Debtor formerly operated a plant in Canton, Ohio, at which it manufactured tubular light poles. Certain employees at the Canton plant were covered by a collective bargaining agreement. All employees were terminated when the plant closed on May 11, 1984. Debtor was obligated until the expiration of the bargaining agreement on November 6, 1986, to pay one-half of the premium on a retirees' optional health insurance program, and to maintain a retirees' life insurance program providing "a nominal lump sum payment upon the retiree's death." *In re Unimet Corp.*, Cas No. 685-00240, slip op. at 1 (Bankr. N.D. Ohio, August 6, 1985). The union seeks to force debtor to continue to pay the premiums required

to maintain the retirees' insurance benefits during the pendency of the reorganization proceedings. The union seeks to require the debtor to make such payments ahead of any payments to any of the debtor's other creditors and claimants.

The procedural background of this action includes the June 11, 1985 motion of the debtor to reject the collective bargaining agreement under 11 U.S.C. § 1113 of the Bankruptcy Code. Pursuant to a hearing on July 23, 1985, the Bankruptcy Court on August 6, 1985 issued an Order which denied the debtor's motion to reject, as the debtor had not complied with the requirements set forth in 11 U.S.C. § 1113. Debtor did not appeal the Order. On August 16, 1985, debtor filed a pleading captioned as an "Application for Order to Pay as Administrative Expenses Certain Insurance Premiums." In that motion, debtor asked the Court to deny the Application. According the debtor, it does not have the authority under the Bankruptcy Code to make the payments as administrative expenses. Consequent to a hearing on debtor's application, the Bankruptcy Court entered an Order on September 27, 1985, denying debtor's application. Bankruptcy Judge Williams concluded that the payments were not required by the Bankruptcy Code, under either 11 U.S.C. § 503(b)(1)(a) or 11 U.S.C. § 1113.

Where there is no genuine issue as to any material fact, the final Orders of the Bankruptcy Court must be upheld if that court "correctly applied the substantive law to the uncontested facts," *In re Ashby Enterprises Ltd.*, 47 Bankr. 394 (D.D.C. 1985).

In the present action, there are two possible sources for the authority to make the payments to the retirees. First, expenses which arise in the course of operating the debtor's business may be paid in the "ordinary course of business," pursuant to 11 U.S.C. § 363(c)(1). The Bankruptcy Court found that the payments are not in the ordinary course of business," and the union has not appealed that finding. Under the other Bankruptcy Code provision, payments may be made if they are an "expense of administration" pursuant to 11 U.S.C. § 503(b)(1)(a) which allows for administrative expenses as

> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services, rendered after the commencement of the case. . .

In the August 6, 1986 Order now on appeal, Bankruptcy Judge Williams concluded that § 1113 of the Bankruptcy Code was intended to protect the interests of active employees only, and excludes retirees from the collective bargaining process.

In this appeal, the Union's position emphasizes the implications of § 1113(f), which states:

> No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

The Union views the Bankruptcy Court Order of August 6, 1986, as a dispositive finding that the debtor has not met its burden and that the provisions of the labor contract remain binding on both parties until such time as the debtor files and successfully sustains a subsequent application to reject.

In a supplemental brief, the union submits an opinion provided by the Congressional Research Service, which was prepared pursuant to this issue as it arose in LTV bankruptcy matters. The Congressional Research Service opinion is not "legislative action" as suggested by the union's motion for leave to file the supplemental brief. The Congressional Research Service is not a party in interest under 11 U.S.C. § 1109(b). Accordingly, debtors' motion to strike from the record all references to the Congressional Research Service report is well taken. However, in a second supplemental brief, the Union supplied the Court with recent legislative action clarifying 11 U.S.C. § 1113(f). The new amended provision, enacted on September 24, 1986 as H.R. 5490, so states:

> (f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions, including any provision relating to benefits for retired former employees, of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1113

The statutory change and legislative history indicate that § 1113 is applicable to retiree health and life insurance benefits owing under a collective bargaining agreement. The legislative history suggests that there is no basis to claim that such benefits are barred by the Bankruptcy Code as prepetition claims. H.R. Rep. No. 99-917, 99th Cong., 2d Sess. at 2 (1986).

Accordingly, the decision of the Bankruptcy Court must be reversed, and the within appeal granted. Therefore, debtor is hereby authorized to pay, as an administrative expense, the insurance premium obligations on the retirees' optional health and life insurance program.

This action is dismissed and terminated.

IT IS SO ORDERED.

/s/ THOMAS D. LAMBROS
Thomas D. Lambros
United States District Judge

DATED: November 17, 1986

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C85-3333A

UNITED STEELWORKERS OF AMERICA,

Plaintiff/Appellant

—v.—

UNIMET CORPORATION,

Defendant/Appellee

JUDGMENT

LAMBROS, DISTRICT JUDGE

In accordance with the memorandum opinion and order of this date in the above-captioned case, the decision of the Bankruptcy Court is reversed and the within appeal is granted.

Debtor is hereby authorized to pay, as an administrative expense, retirees' insurance benefits due under the collective bargaining agreement.

This action is dismissed and terminated.

IT IS SO ORDERED.

/s/ THOMAS D. LAMBROS
Thomas D. Lambros
United States District Judge

DATED: November 17, 1986

Appendix F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Judge Williams

Case No. 685-00240

In Proceedings for Reorganization

IN RE:

UNIMET Corporation fka The Union Metal Manufacturing Company

Debtor

MOTION FOR APPROVAL OF REJECTION OF COLLECTIVE BARGAINING AGREEMENTS

Now comes UNIMET Corporation, Debtor and Debtor in Possession herein, and for its Motion respectfully represents as follows:

1. Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on March 8, 1985, and continues to operate its business pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

UNIMET's Collective Bargaining Agreement With the International Brotherhood of Boilermakers, Ship Builders, Blacksmiths, Forgers and Helpers Local Lodge No. 92-AFL-CIO

2. On December 27, 1983, Debtor entered into a contract with Standard Brands Realty Co., Inc. for the sale of the real

property at its Pacific Union Metal Division (hereinafter "Pumpco Division," "Pumpco Facility" or Pumpco Operations") in Long Beach, California. On December 31, 1983, Debtor entered into a contract with Union Metal Corporation for the sale of all other property and assets of its Pumpco Division.

3. As of the date of said sales, approximately seventy (70) individuals were employed at the Pumpco Operations and covered under a Collective Bargaining Agreement between UNIMET Corporation, fka The Union Metal Manufacturing Company, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 92-AFL-CIO (hereinafter the "Union") which Agreement became effective June 1, 1983.

4. Debtor has no existing obligations to the Union or the employees which it represents under the Collective Bargaining Agreement. Because Debtor has sold its Pumpco Division and no longer engages in the business formerly conducted at the Pumpco Facilities, there is no reason for the Collective Bargaining Agreement to remain in existence and it is appropriate to terminate the same.

5. Debtor has made a proposal to Mr. Jack Doore, the authorized representative of the employees covered by the Collective Bargaining Agreement based upon the most complete and reliable information available at the time of such proposal, which provides for the necessary modifications in the employee benefits and protections that are necessary to permit the reorganization of the Debtor and assure that all creditors, the Debtor, and all affected parties are treated fairly and equitably.

6. The Debtor has further made available to Mr. Doore such relevant information as is necessary to evaluate the proposal.

7. The Debtor has conferred with Mr. Doore in good faith in an effort to reach a mutually satisfactory modification of the Collective Bargaining Agreement and has worked out with Mr. Doore what it feels is a satisfactory basis for the termination of the Collective Bargaining Agreement.

8. The proposal entails Debtor's providing of conversion rights to eight retirees eligible for life and health insurance benefits under the Collective Bargaining Agreement.

9. Debtor has provided these conversion rights to the eligible retirees and Mr. Doore has indicated his willingness to terminate the insurance obligations of Debtor under the Collective Bargaining Agreement.

10. Debtor submits that no ongoing relationship between the Union and the Debtor exists and therefore, the balance of the equities clearly favor rejection of such Agreement.

WHEREFORE, Debtor prays that after such notice as the Court may deem appropriate, and after hearing hereon, the Court approve the termination of Debtor's Collective Bargaining Agreement with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 92-AFL-CIO, and that it have such other and further relief as is just.

UNIMET's Collective Bargaining Agreement with
The United Steel Workers of America, AFL-CIO

11. On or about May 11, 1984, Debtor ceased conducting operations or doing business at its Tubular Products Group Division (hereinafter "TPG Division") located in Canton, Ohio.

12. On that date, the hourly employees of Debtor's TPG Division were covered under a Collective Bargaining Agreement between UNIMET Corporation, fka The Union Metal Manufacturing Company, and the United Steel Workers of America, AFL-CIO (hereinafter the "Union") which Agreement became effective November 7, 1983.

3. Upon ceasing operations at its TPG Division, Debtor permanently terminated the employment of approximately sixty (60) employees covered under the Collective Bargaining Agreement.

4. Debtor has no intent to conduct any future operations at its TPG Division.

5. Debtor's only remaining obligations under the Collective Bargaining Agreement are to provide:

(a) 13 eligible TPG retirees with hospital and surgical insurance coverage at a cost of $3,460 per month; and

(b) approximately 150 eligible TPG retirees with certain life insurance benefits ranging from $1,000 to $4,000, depending on the date of retirement at a cost of $1,653 per month.

6. Because Debtor has permanently closed its TPG Division and no longer engages in the business formerly conducted at its TPG plant, to continue to be obligated under the Collective Bargaining Agreement inhibits Debtor's prospects for a successful reorganization and the equities favor rejection of the Agreement.

7. Debtor has made a proposal to Mr. Arlett Gatewood and James S. Gwin, Esq., authorized representatives of the employees covered under the Collective Bargaining Agreement, based upon the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employee benefits and protections that are necessary to permit the reorganization of the Debtor and assure that all creditors, the Debtor, and all affected parties are treated fairly and equitably.

8. The Debtor has further made available to Mr. Gatewood and Attorney Gwin such relevant information as is necessary to evaluate the proposal.

9. The Debtor has conferred with Mr. Gatewood and Attorney Gwin in good faith in an effort to reach a mutually satisfactory termination of the Collective Bargaining Agreement, but the negotiations have not succeeded and there is no prospect that future negotiations will be productive.

WHEREFORE, Debtor prays that after such notice as the Court may deem appropriate, and after hearing hereon, the Court approve the termination of Debtor's Collective Bargaining Agreement with the United Steel Workers of America,

AFL-CIO, and that it have such other and further relief as is just.

Respectfully submitted,

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Telephone: (216) 456-8341
Attorneys for Debtor

By: /s/ JOEL K. DAYTON
Joel K. Dayton
One of its Attorneys

Appendix G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
AT CANTON

In Proceeding for Reorganization
Under Chapter 11

Case No. 685-00240

Judge James H. Williams

In re:

UNIMET Corporation,

Debtor.

APPLICATION FOR ORDER TO PAY AS ADMINISTRATIVE EXPENSES CERTAIN INSURANCE PREMIUMS

UNIMET Corporation, debtor and debtor in possession, respectfully applies to the Court for an Order requiring it to pay one-half of certain hospital and surgical insurance premiums and life insurance premiums for those retired former employees of Debtor's Tubular Products Group Division who are eligible for such benefits under the terms of the collective bargaining agreement between Debtor and The United Steelworkers of America, AFL-CIO (the "Steelworkers") as an administrative expense pursuant to Section 503(b) of the Bankruptcy Code, 11 U.S.C. § 503(b). Debtor makes this application for an order requiring it to pay such benefits because Debtor is of the view that such benefits are not administrative expenses entitled to priority under Section 503(b) and, therefore, Debtor must have the authorization of this Court before it can pay such benefits. In con-

nection with this Application, Debtor respectfully represents as follows:

1. On March 8, 1985, Debtor filed a Petition for Reorganization under Section 301 of the Bankruptcy Code, 11 U.S.C. § 301. Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, 11 U.S.C. §§ 1107, 1108, Debtor has retained possession of its assets and continued the operation and management of its affairs.

2. The retired former employees of Debtor who are eligible to receive the benefits in question ceased working for Debtor on or before May 11, 1984, when Debtor sold its Tubular Products Group operations and none of these former employees now worked for the Debtor.

3. The expenses in question (payment of insurance premiums for the former employees) do not qualify as administrative expenses entitled to a priority under Section 503(b) and payment of these expenses at this time will result in the likelihood that Debtor will not have the cash needed to pay other expenses entitled to priority under Section 503(b). Under these circumstances payment of the insurance premiums in question will hamper the Debtor's efforts at reorganization, and confer a *de facto* priority on such insurance premiums which is higher than the priority granted under Section 503(b)(1)(A) for administrative expenses incurred to preserve the estate for "services rendered after commencement of the case."

4. The insurance premiums in question are payable monthly. The current monthly payments have not yet been made by Debtor. Without an order from this Court Debtor does not intend to make such payments.

5. For the reason set forth herein, before expending its limited funds on an expense which does not help preserve or otherwise benefit the estate, and which is not an administrative expense entitled to priority under Section 503(b), the Debtor respectfully seeks an order of this Court which either (i) permits the Debtor not to pay such premiums at the present time, or (ii) requires that such payments be made for so long as is required

by law or under the collective bargaining agreement between the Steelworkers and the Debtor.

WHEREFORE, Debtor prays for an Order which either (i) permits the Debtor not to pay the insurance premiums in question, reserving for later determination the resulting claim of the former employees against Debtor or (ii) requires Debtor to make such payments currently for so long as is required by law or under the collective bargaining agreement between the Steelworkers and the Debtor.

Respectfully submitted,

OF COUNSEL:

HAHN, LOESER, FREEDHEIM,
DEAN & WELLMAN

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Counsel for the Debtor,
Unimet Corporation

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Reorganization Proceedings

Case No. 685-00240

IN THE MATTER OF:

UNIMET CORPORATION

Debtor.

ORDER

Made at Canton, Ohio this 27th day of September, 1985.

For the reasons set forth in the accompanying Memorandum of Decision, the application of the debtor, the Unimet Corporation, for authority to pay as administrative expenses certain life and group health insurance premiums arising out of a collective bargaining agreement with the United Steelworkers of America Local No. 1590, AFL-CIO must be DENIED.

IT IS SO ORDERED.

/s/ JAMES H. WILLIAMS

James H. Williams
United States Bankruptcy Judge

Appendix H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Reorganization Proceedings

Case No. 685-00240

IN THE MATTER OF:

UNIMET CORPORATION

Debtor.

MEMORANDUM OF DECISION

Made at Canton, Ohio this 6th day of August, 1985.

Appearances: Lee D. Powar, Esq., Harry D. Mercer, Esq., of Hahn, Loeser, Freedheim, Dean & Wellman Co. L.P.A., Cleveland, Ohio, counsel for the debtor; James S. Gwin, Esq., of Gutierrez, Mackey & Gwin Co., L.P.A., Canton, Ohio, counsel for Local 1590, The United Steelworkers of America, AFL-CIO.

This matter comes before the court upon the application of the debtor, Unimet Corporation (Unimet) to reject a collective bargaining agreement with Local 1590, The United Steelworkers of America, AFL-CIO (Union), filed pursuant to 11 U.S.C. § 1113.

The debtor's proposed action will affect the health and life insurance benefits of retired employees only. There are no employees on active status as the manufacturing operations were shut down as of May 11, 1984. If approved, an optional health insurance program pursuant to which the company and the retiree share the premium payment will be eliminated as will a life

insurance program providing a nominal lump sum payment upon the retiree's death.

The application came on for hearing on July 23, 1985 and at the conclusion of the debtor's case in support of rejection, the Union moved for dismissal, arguing that the debtor failed to meet its burden of proof as required by Section 1113.

I

Bankruptcy Rule 7041 governs these proceedings.[1] That rule in turn fully incorporates the language of Fed. R. Civ. P. 41 which in relevant part provides:

> . . . (b) Involuntary Dismissal: Effect Thereof.
>
> . . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his rights to offer evidence, in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as the trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence . . .[2]

The evaluation which a court must make when guided by Fed. R. Civ. P. 41(b) is broader than the traditional evaluation on a motion for a directed verdict made pursuant to Fed. R. Civ. P. 50. *Sworob v. Harris*, 451 F. Supp. 96 (E.D. Pa. 1978), *cert. denied*, 439 U.S. 1089 (1979). In its capacity as the trier of fact, the court under a Rule 41(b) motion must resolve conflicts in the plaintiff's evidence and weigh that evidence to find where the preponderance lies without making any special inferences in

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1 *See* Bankruptcy Rule 9014, affecting contested matters in general which makes Bankruptcy Rule 7041 applicable to these proceedings.

2 At the hearing, the Union's counsel denominated his motion as one for a directed verdict pursuant to Fed. R. Civ. P. 50. In matters tried to the bench, Fed. R. Civ. P. 41(b) provides the proper procedural vehicle. *See*, 5 J. Moore, *Moore's Federal Practice* para. 41.13[4] at p. 181 (2d ed. 1985).

favor of the plaintiff. *Bossier City Medical Suite, Inc. v. City of Bossier*, 483 F. Supp. 633 (W.D. La. 1980). It is therefore within the court's discretion, where the plaintiff's case is not established by a preponderance of the evidence, to grant the motion to dismiss. *United States v. Westinghouse Electric Corp.*, 471 F. Supp. 532 (N.D. Calif. 1978), *modified*, 648 F.2d 642 (9th Cir. 1981).

Tempering the obvious goals of judicial economy and the expeditious resolution of matters on the court's calendar is the recognition that the granting of a Rule 41(b) motion short-circuits the trial process to which the plaintiff has a fundamental right. Consequently the court, with caution as its guiding light, will apply the rule sparingly and limit its application to those instances where it is manifestly clear that the plaintiff has failed in proving its case. *D.P. Apparel Corp. v. Roadway Express, Inc.*, 736 F.2d 1 (1st Cir. 1984).

II

11 U.S.C. § 1113 reads:

> Rejection of collective bargaining agreements.
>
> (a) The debtor in possession, . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
>
> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—
>
> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and

all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutual satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement. . . .

The legislation, representing Congressional reaction to the Supreme Court decision in *NLRB v. Bildisco & Bildisco*, ____ U.S. ____, 79 L. Ed. 2d 482, 104 S. Ct. 1188 (1984) (Bildisco) is new.[3] Consequently, judicial interpretation of its provisions has been scant. Nonetheless, among the few cases which have considered section 1113 applications, an emerging "majority" view is already evident.

In particular, it has been decided that the procedural and substantive requirements of subsections (b)(1), (b)(2) and (c) can be dissected into nine (9) fundamental elements upon each of which the debtor bears some burden of proof. *See In re American Provision*, 44 B.R. 907 (Bankr. Minn. 1984); *In re Salt*

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3 *See*, The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333, which took effect on October 10, 1984.

Creek Freightways, 47 B.R. 835 (Bankr. Wyo. 1985); *In re Wheeling-Pittsburgh Steel Corporation*, No. 85-793 PGH (Bankr. W. D. Pa. July 17, 1985). Those elements are:

1. The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement.

2. The proposal must be based on the most complete and reliable information available at the time of the proposal.

3. The proposed modifications must be necessary to permit the reorganization of the debtor.

4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.

5. The debtor must provide to the Union such relevant information as is necessary to evaluate the proposal.

6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union.

7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.

8. The Union must have refused to accept the proposal without good cause.

9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

In re American Provision, *supra* at 909.

The debtor as the movant, bears the burden of persuasion on *all* of the statutory elements. *See* 130 Cong. Rec. S8899 (daily ed. June 29, 1984) (statement of Sen. Kennedy). *See also*, *In re American provision*, *supra* at 909-910; *In re Salt Creek Freightways*, *supra*, at 838. However, at least with respect to elements 5, 7 and 8 above, one court has imposed the burden of going forward on the Union. *In re American Provision*, *supra* at 909-910. In view of the foregoing legislative history and other precedents, the court, after applying the facts of this case to the

statutory requirements of section 1113, finds that the debtor has failed to satisfy its requisite burden of proof with the result that the motion to dismiss must be granted.

On the record before it, the court is not persuaded that the debtor has entered into the mandatory good-faith negotiation process outlined in section 1113(b)(2).

In *Bildisco* the Supreme Court, while recognizing the divergent interests of the National Labor Relations Act (NLRA) at sections 8(a) and 8(d) (29 U.S.C. § 158(a) and § 158(d)) with those of Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.) nevertheless observed that the preservation of the negotiation process was one area in which those interests can and must be harmonized. In particular, Justice Rehnquist said:

> Before acting on a petition to modify or reject a collective-bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The NLRA requires no less. Not only is the debtor-in-possession under a duty to bargain with the union . . . but the national labor policies of avoiding labor strife and encouraging collective bargaining . . . generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. The Bankruptcy Court need step into this process only if the parties' inability to reach an agreement threatens to impede the success of the debtor's reorganization. If the parties are unable to agree, a decision on the rejection of the collective-bargaining agreement may become necessary to the reorganization process. At such a point, action by the Bankruptcy Court is required, while the policies of the Labor Act have been adequately served since reasonable efforts to reach agreement have been made.

79 L. Ed.2d at 495-96 (citations omitted). Although the resulting legislation that emerged in the form of section 1113 materially modified *Bildisco* in certain respects, the above language was approved by the drafters and retained in the form of subsection (b)(2).

Indeed, the court cannot ignore the impressive bipartisan support given to this issue as shown by the following comments made on the floor of both houses of Congress:

> The provision [§ 1113] ensures that a process of negotiation will take place between the employer and union in a reorganization case before the hearing for rejection of the collective bargaining agreement is commenced.

(Statements of Rep. Rodino) 130 Cong. Rec. H 7489 (daily ed. June 29, 1984).

> After the proposal has been made, the trustee [debtor in possession] is *directed* to meet with representatives of the company and the union for good faith negotiations on the proposal.

(Statements of Rep. Moorhead) 130 Cong. Rec. H 7491 (daily ed. June 29, 1984) (emphasis added)

> The first step of this process will of course involve good faith negotiations between the parties. *This was a requirement articulated by the Supreme Court in the Bildisco case. The conference . . . preserved the spirit of that court holding by requiring good faith efforts to confer in an effort to reach an agreement between the business and its union employees which will both preserve the labor contract and save the business.*

(Statements of Senator Hatch) 130 Cong. Rec. S 8892 (daily ed. June 29, 1984) (emphasis added)

> This provision [§ 1113] places *the primary focus* on the private collective-bargaining process and not in the courts.

(Statements of Senator Packwood) 130 Cong. Rec. S 8898 (daily ed. June 29, 1984) (emphasis added)

The "negotiation" process employed here is embodied in two exhibits of correspondence which, in the absence of any other credible evidence, comprise the totality of the collective bargaining efforts which took place here.

On April 18, 1985 the debtor's director of personnel wrote to the Union's counsel and confirmed "our conversation of April 10, 1985." *See*, Steelworkers' Exhibit #2. That confirmation

was augmented by a short recital of the terms of the proposal to eliminate the health and life insurance benefits but contains nothing to encourage further dialogue between the parties.

The Union, through its counsel, replied on April 26 that the Union was, in principle, rejecting the terms contained in the letter of April 18. *See*, Steelworkers' Exhibit #3. In conclusion, however, the Union further advised that it was "ready to meet and confer with you about any proposal the company may wish to make with regard to the modification of this contract." According to the testimony of the debtor's current chief executive officer, the Union's April 26 letter was regarded as an outright rejection of the company's proposal to which the company responded by filing the within application to reject the agreement.

The court recognizes that neither the debtor nor the Union specifically requested any further meetings on the proposal. However, without an outright refusal by the Union to negotiate the April 18 proposal, the debtor had an affirmative duty to further seek a negotiated settlement and live up to the spirit and intent of section 1113 which is to make the judicial intervention of the bankruptcy court secondary to the collective bargaining process. *Bildisco*, *supra*. Indeed, the debtor's conduct takes on the color of a "take it or leave it" attitude which undermines the good-faith bargaining process the statute envisions. The debtor's position manifests an intent not to enter into any contract with the Union which of itself constitutes the absence of good faith bargaining. *See Pease Co. v. N.L.R.B.*, 666 F.2d 1044 (6th Cir. 1981).

Because the court views the statutory elements of section 1113 as all-inclusive, non-compliance with any one of them is fatal to the debtor's cause. Finding as it does that the debtor has not entered into the bargaining process required by section 1113(b)(2), the court need not consider the other elements of the statute to grant the motion for dismissal.

An order consistent with the findings of this Memorandum will be entered forthwith.

/s/ JAMES H. WILLIAMS
James H. Williams
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Reorganization Proceedings

Case No. 685-00240

IN THE MATTER OF:

UNIMET CORPORATION

Debtor.

ORDER

Made at Canton, Ohio this 6th day of August, 1985.

For the reasons set forth in the accompanying Memorandum of Decision, the application of the debtor, Unimet Corporation, for authority to reject its collective bargaining agreement with The United Steelworkers of America Local No. 1590, AFL-CIO, must be DENIED.

IT IS SO ORDERED.

/s/ JAMES H. WILLIAMS
James H. Williams
United States Bankruptcy Judge

Appendix I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Proceedings for a Reorganization Under Chapter 11

Bankruptcy Case No. 685-00240

District Court Case No. C85-3333A

District Judge Thomas D. Lambro

In re:

UNIMET CORPORATION,

Debtor.

MOTION TO AMEND AND RECONSIDER MEMORANDUM OPINION AND ORDER FILED NOVEMBER 18, 1986.

Appellee, Unimet Corporation, the Debtor and Debtor-in-Possession herein (the "Debtor"), respectfully requests that this Court amend and reconsider its Memorandum Opinion and Order filed November 18, 1986 (the "Opinion"). Exhibit A. This Motion is made pursuant to Bankruptcy Rule 8015 and Fed. R. Civ. P. 52(b). Fed. R. Civ. P. 52(b) is incorporated for purposes of this proceeding by Bankruptcy Rules 9014 and 7052. The reasons for this Motion are as follows:

BACKGROUND

This is an appeal from the decision of the United States Bankruptcy Court for the Northern District of Ohio (the "Bankruptcy Court") rendered on August 6, 1986. As stated in the Opinion, Appellants, the United Steelworkers of America

("USWA"), seek to force the Debtor to continue to pay the premiums required to maintain insurance benefits for the Debtor's retirees during the pendency of the Debtor's Chapter 11 reorganization proceedings. Opinion, at page 2. Further, the USWA "seeks to require the Debtor to make such payments ahead of any payments to any of the Debtor's other creditors and claimants." *Id.*

The Bankruptcy Court found that the payments could not be made under the Bankruptcy Code. Specifically, the Bankruptcy Court considered and rejected 11 U.S.C. § 363(c)(1), 11 U.S.C § 503(b)(1)(a) and 11 U.S.C. § 1113 ("§ 1113") as potential sources of authority for the payments. Opinion, at pages 2-3.

The USWA's appeal centered on whether the Bankruptcy Court had correctly interpreted § 1113, emphasizing particularly the implications of § 1113(f). Opinion, at page 3. The Bankruptcy Court had found that § 1113 "was intended to protect the interests of active employees only, and excludes retirees from the collective bargaining process." *Id.*

In the Opinion, this Court found that the Bankruptcy Court's interpretation of § 1113 was erroneous. In support of its findings, this Court relied on "recent legislative action clarifying 11 U.S.C. Section 1113(f), which was submitted to this Court in the Second Supplemental Brief" of the USWA. Opinion, at page 4. The specific legislation submitted by the USWA, H.R. 5490, indicated that Congress had added the phrase "including any provision related to benefits for retired former employees" to § 1113(f). Understandably, this Court found that

> The statutory change and legislative history indicate that Section 1113 is applicable to retiree health and life insurance benefits owing under a collective bargaining agreement. The legislative history suggests that there is no basis to the claim that such benefits are barred by the Bankruptcy Code as pre-petition claims. H.R. Rep. No. 99-917, 99th Cong., 2d Sess. at 2 (1986).
>
> Accordingly, the decision of the Bankruptcy Court must be reversed, and within appeal granted.

Unfortunately, the version of H.R. 5490 submitted by the USWA, which this Court assumed to be a "statutory change,"

was never enacted into law. The USWA failed to follow the admittedly confusing legislative history of H.R. 5490 to its conclusion—passage by *both houses of Congress and signing by the President*. The version of H.R. 5490 which *was* passed by Congress and signed by the President does not support the position taken by the USWA in this appeal, but rather supports the position of the Debtor.[1]

ARGUMENT

H.R. 5490, AS PASSED BY THE CONGRESS AND SIGNED BY THE PRESIDENT, IS SIGNIFICANTLY DIFFERENT THAN THE VERSION OF H.R. 5490 CONTAINED IN THE SECOND SUPPLEMENTAL MEMORANDUM OF LAW AND DOES NOT APPLY TO THE FACTS OF THIS CASE

H.R. 5490 was introduced in the House of Representatives by Congressman Louis Stokes and in the Senate by Senator Howard Metzenbaum. As noted in the Opinion, H.R. 5490 was intended to amend § 1113.[2] The version of H.R. 5490 attached to the Second Supplemental Memorandum is the language originally introduced by Representative Stokes and Senator Metzenbaum and originally passed by the House of Representatives.

Section 1113, as it existed prior to H.R. 5490, was a result of compromises reached in the Senate Committee on the Judiciary, chaired by Senator Thurmond. When H.R. 5490 was introduced in the Senate, Senator Thurmond objected to the attempt to amend Section 1113 on the ground that it would upset the balance struck by the original framers of the section. In response to Senator Thurmond's objection, Senators Metzenbaum and Thurmond reached a compromise which called for

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1 The Debtor regrets that it was unable to bring the correct version of H.R. 5490 to the Court's attention before the Opinion was issued. However, the close of the 99th Congress was chaotic, and it was difficult to verify the information contained in the Second Supplemental Memorandum. Unfortunately, that information turned out to be incomplete at best.

2 H.R. 5490 was introduced as a response to perceived inequities in the LTV Steel Chapter 11 case.

limiting the effect of H.R. 5490 to a very specific set of circumstances. The amendment agreed to by Senators Metzenbaum and Thurmond was passed by the Senate.

H.R. 5490, as amended and passed by the Senate, stated in its entirety:

> Section 1. Notwithstanding any provision of chapter 11 of title 11, United States Code, the Trustee shall pay benefits until May 15, 1987 to retired former employees under a plan, fund or program maintained or established by the Debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.
>
> Section 2. This Act is effective with respect to cases commenced under chapter 11 of title II, United States Code, in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases under which an order for relief is entered under chapter 11 of title 11, United States Code, after October 2, 1986, which such case is a case under chapter 11.

Cong. Rec. S 15048 (daily ed. Oct. 3, 1986). Exhibit B. Without even considering whether the benefits at issue in this case meet the requirements of Section 1 above, H.R. 5490 as passed by Congress and signed into law does not, by its specific terms, apply to this case because (1) no benefits in this case were being paid on October 2, 1986 and (2) the order for relief in this case was entered before October 2, 1986.

In addition, in explaining the amendment on the Senate floor, Senator Thurmond, with Senator Metzenbaum's apparent agreement, stated:

> [T]his substitute amendment provides temporary protection for some retiree benefits. However, in no way is the language of this amendment intended, nor should it be construed, to affect the interpretation of Section 1113 of the Bankruptcy Code.

Id. at S 15049. Exhibit C.

In the rush to adjournment, Congress did not convene a separate conference committee to resolve the differences in the two versions of H.R. 5490. Instead, H.R. 5490 was considered by the Conference Committee on House Joint Resolution 738 ("H.J. Res. 738"), the end-of-year appropriations bill, which runs over 1,000 pages. The Conference Report on H.J. Res. 738 adopted the *Senate's version* of H.R. 5490. Exhibit D.

H.J. Res. 738 was passed by both Houses of Congress on October 17, 1986 and was signed by President Reagan on October 18, 1986. (H.J. Res. 738 was subsequently re-passed and re-signed with technical corrections not relevant here.) Therefore, the version of H.R. 5490 contained in the Second Supplemental Memorandum is not law. In contrast, the version of H.R. 5490 set forth above has become law: specifically, Public Law No. 99-591. Exhibit E.

The history of H.R. 5490 reaffirmed Congress' intent to leave the existing interpretation of Section 1113 unchanged, except with respect to the very specific set of circumstances contained in the amendment. With the introduction of H.R. 5490 in its original form, Congress was given the opportunity to amend Section 1113 so as to change the result in cases such as this. Instead, Congress confirmed the interpretation of Section 1113 set forth by the Bankruptcy Court, and adopted only a limited amendment dealing with a very specific situation. The passage of H.R. 5490 therefore supports a decision to affirm the decision of the Bankruptcy Court in this case.

WHEREFORE, for all the above reasons, the Debtor respectfully requests that the Court amend and reconsider the Memorandum and Opinion filed November 18, 1986, and affirm the decision of the Bankruptcy Court.

Respectfully submitted,

OF COUNSEL:

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Appendix J

100TH CONGRESS
1ST SESSION H.R. 1040

To amend title 11 of the United States Code to give priority to certain unsecured claims of retired former employees of the debtor, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 5, 1987

Mr. REGULA (for himself, Mr. MURTHA, Mr. GAYDOS, Mr. BEVILL, Mr. FAZIO, Mr. MOLLOHAN, Mr. DAVIS of Illinois, Mr. BROWN of California, and Mrs. BENTLEY) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 11 of the United State Code to give priority to certain unsecured claims of retired former employees of the debtor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CLAIMS OF RETIRED FORMER EMPLOYEES FOR CERTAIN EMPLOYEE BENEFITS.

(a) PRIORITY OF CLAIMS.—Section 507(a) of title 11, United States Code, is amended—

(1) in paragraph (7) by striking "(7) Seventh" and inserting "(8) Eighth",

(2) in paragraph (6) by striking "(6) Sixth" and inserting "(7) Seventh",

(3) in paragraph (5) by striking "(5) Fifth" and inserting "(6) Sixth", and

(4) by inserting after paragraph (4) the following:

"(5) Fifth, allowed unsecured claims of retired former employees for payments to any employee health insurance plan, employee pension plan, or employee life insurance plan—

"(A) arising from services rendered before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

"(B)(i) for each such health insurance plan, to the extent of aggregate of the present value of the total contributions payable to such health insurance plan with respect to all retired former employees covered by such health insurance plan;

"(ii) for each such pension plan, to the extent of the amount by which the aggregate of the present value of the total benefits payable under such pension plan with respect to all retired former employees covered by such pension plan exceeds the aggregate of the present value of the total benefits to be paid under title IV of the Employee Retirement Income Security Act of 1974 to all retired former employees with respect to such pension plan, but only to the extent of $90,000 for each retired former employee; and

"(iii) for each such life insurance plan, to the extent of the aggregate of the present value of the total premiums payable to such life insurance plan to provide death benefits with respect to all retired former employees covered by such life insurance plan, but only to provide $10,000 in death benefits with respect to each retired former employee;

less the extent to which such claims of retired former employees have priority under paragraph (4).".

(b) SUBROGATION.—Section 507(d) of title 11, United States Code, is amended by striking "or (a)(6)" and inserting "(a)(7), or (a)(8)".

(c) TREATMENT OF CERTAIN LIENS.—Section 724(b)(2) of title 11, United States Code, is amended by striking "or 507(a)(6)" and inserting "507(a)(6), or 507(a)(7)".

(d) CONFIRMATION OF PLAN.—Section 1129(a)(9) of title 11, United States Code, is amended—

(1) in subparagraph (B) by striking "or 507(a)(6)" and inserting ", 507(a)(6), or 507(a)(7)", and

(2) in subparagraph (C) by striking "507(a)(6)" and inserting "507(a)(7)".

(e) CONFORMING AMENDMENTS.—

(1) Sections 502(i), 503(b)(1)(B)(i), and 532(a)(1)(A) of title 11, United States Code, are each amended by striking "507(a)(7)" and inserting "507(a)(8)".

(2) Section 726(b) of title 11, United States Code, is amended by striking "or (7)" and inserting "(7), or (8)".

(3) Section 1123(a)(1) of title 11, United States Code, is amended by striking "507(a)(7)" and inserting "507(a)(8)".

SEC. 2. DEBTOR'S OBLIGATION WITH RESPECT TO CLAIMS OF RETIRED FORMER EMPLOYEES.

Section 608(a) of the second title VI of the joint resolution entitled "Joint Resolution making continuing appropriations for the fiscal year 1987, and for other purposes", aproved October 30, 1986 (Public Law 99-591), is amended by striking "pay benefits until May 15, 1987", and inserting "insure the payment of benefits".

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—The amendments made by this Act shall not apply with respect to—

(1) any case commenced under title 11 of the United States Code before July 1, 1986, or

(2) any case under chapter 11 of title 11, United States Code, in which a plan is confirmed before the date of the enactment of this Act.

Appendix K

Calendar No. 376

100TH CONGRESS
1ST SESSION H. R. 2969

IN THE SENATE OF THE UNITED STATES

OCTOBER 13, 1987

Received; read twice and ordered to be placed on the calendar

AN ACT

To amend chapter 11 of title 11 of the United States Code to improve the treatment of claims for certain retiree benefits of former employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Retiree Benefits Bankruptcy Protection Act of 1987".

SEC. 2. RETIREE BENEFITS.

(a) BENEFITS.—Subchapter I of chapter 11 of title 11, United States Code, is amended by adding at the end thereof the following new section:

"§ 1114. Payment of insurance benefits to retired employees

"(a) For purposes of this section, the term 'retiree benefits' means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disabil-

ity, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

"(b)(1) For purposes of this section, the term 'authorized representative' means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

"(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title for the purpose of carrying out the purposes of sections 1114 and 1129(a)(12) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

"(c)(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate.

"(2) In cases where the labor organization referred to in paragraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to paragraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

"(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.

"(e)(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has an appointed under the provision of this chapter (hereinafter in this section 'trustee' shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that—

> "(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section; or
>
> "(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments;

after which such benefits as modified shall continue to be paid by the trustee.

"(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

"(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—

> "(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

"(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

"(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

"(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

"(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

"(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

"(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities;

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): *Provided, however*, That at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3); and: *Provided further*, That neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

"(h)(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

"(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

"(3) The implementation of such interim changes does not render the motion for modification moot.

"(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section 1129 of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

"(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title.

"(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at lease ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

"(2) The court shall rule on such application for modification within 90 days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the

authorized representative may agree to. If the court does not rule on such application within 90 days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

"(3) The court may enter such protective orders, consistent with the need of the authorized representative of the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

"(1) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the 12 months preceding the filing of the bankruptcy petition equals or exceeds $250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.".

(b) PLAN.—Section 1129 of title 11, United States Code, is amended by adding at the end of subsection (a) thereof the following:

"(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.".

(c) TECHNICAL AMENDMENT.—The table of sections for subchapter I of chapter 11, title 11, United States Code, is amended by adding at the end thereof the following new item:

"1114. Payment of insurance benefits to retired employees.".

SEC. 3. CONFORMING AMENDMENTS.

(a) PUBLIC LAW 99-591.—(1) Section 608(a) of the second title VI of the joint resolution entitled "Joint Resolution making continuing appropriations for the fiscal year 1987, and for other purposes", approved October 30, 1986 (Public Law 99-591), is amended by—

(1) by striking "Notwithstanding" and all that follows through "Code" and inserting "(1) Subject to paragraphs (2), (3), (4), and (5), and notwithstanding title 11 of the United States Code",

(2) by striking "until" and all that follows through "1987", and

(3) by adding at the end thereof the following:

"(2) The level of benefits required to be paid by this subsection may be modified prior to confirmation of a plan under section 1129 of such title if—

"(A) the trustee and an authorized representative of the former employees with respect to whom such benefits are payable agree to the modification of such benefit payments; or

"(B) the court finds that a modification proposed by the trustee meets the standards of section 1113(b)(1)(A) of such title and the balance of the equities clearly favors the modification.

If such benefits are covered by a collective bargaining agreement, the authorized representative shall be the labor organization that is signatory to such collective bargaining agreement unless there is a conflict of interest.

"(3) The trustee shall pay benefits in accordance with this subsection until—

"(A) the dismissal of the case involved; or

"(B) the effective date of a plan confirmed under section 1129 of such title which provides for the con-

tinued payment after confirmation of the plan of all such benefits at the level established under paragraph (2) of this subsection, at any time prior to the confirmation of the plan, for the duration of the period the debtor (as defined in such title) has obligated itself to provide such benefits.

"(4) No such benefits paid between the filing of a petition in a case covered by this section and the time a plan confirmed under section 1129 of such title with respect to such case becomes effective shall be deducted or offset from the amount allowed as claims for any benefits which remain unpaid, or from the amount to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future benefits or from any benefit not paid as a result of modifications allowed pursuant to this section.

"(5) No claim for benefits covered by this section shall be limited by section 502(b)(7) of such title.".

(2) Section 608(b) of the second title VI of the joint resolution entitled "Joint Resolution making continuing appropriations for the fiscal year 1987, and for other purposes", approved October 30, 1986 (Public Law 99-591), is amended by inserting before the period the following: "and before the date of the enactment of the Retiree Benefits Bankruptcy Protection Act of 1987".

(b) PUBLIC LAW 99-656.—Section 2 of the Act entitled "An Act to amend the interest provisions of the Declaration of Taking Act", approved November 14, 1986 (Public Law 99-656), is repealed.

SEC. 4. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) GENERAL EFFECTIVE DATE.—Except as provided in subsection (b), the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—The amendments made by section 2 shall not apply with respect to cases com-

menced under title 11 of the United States Code before the date of the enactment of this Act.

Passed the House of Representatives October 13, 1987.

Attest: DONNALD K. ANDERSON,

Clerk.

By DALLAS L. DENDY, JR.,

Assistant to the Clerk.